STANDARD CHARTERED BANK MALAYSIA BHD A

v.

HEW HAI WOON

HIGH COURT MALAYA, KUALA LUMPUR B
HISHAMUDIN YUNUS J
[CIVIL SUIT NO: S3-24-1368-2004]
20 FEBRUARY 2006

LAND LAW: *Charge - Enforcement of - Whether charge relied upon fatally defective - Failure to provide copy of charge to defendant - Right of chargor - Whether unlawful for chargee bank to retain chargor's copy - Withholding chargor's copy of charge without lawful excuse - Whether charge unenforceable against defendant* C

LAND LAW: *Charge - Order for sale - Application for - Whether charge relied upon fatally defective - Failure to provide copy of charge to defendant - Right of chargor - Whether unlawful for chargee bank to retain chargor's copy - Withholding chargor's copy of charge without lawful excuse - Whether charge unenforceable against defendant* D E

This originating summons was an application by the plaintiff/chargee for an order that a property of the defendant/chargor be sold by public auction pursuant to s. 256 of the National Land Code ('the NLC') and O. 83 of the Rules of the High Court ('the RHC'). In 1992, the property was charged to the plaintiff bank as a security in respect of two loans granted by the plaintiff bank to the defendant. At the time of the granting of the loans, the apartment unit did not yet have a strata title. For the purpose of securing the loans, the plaintiff entered into a loan agreement cum assignment ('the LACA') with the defendant, with the assignment by the defendant of his rights in the property under the sale and purchase agreement to the plaintiff as the security for the loans. The defendant, however, defaulted on the repayment of the loans. Hence, the plaintiff's solicitors issued a notice of demand dated 26 January 1998 to the defendant. The defendant took no action on the demand letter. What followed was the issuance by the plaintiff to the defendant of a letter dated 22 June 1998 terminating the loan facilities and demanding that the defendant pay the amounts stipulated in the letter, failing which the plaintiff would proceed to take over possession of the property and to sell the same pursuant to the LACA. Subsequently in 2002, the strata title in respect of F G H I

the apartment unit was issued, and the unit was registered in the name of the defendant. Following the issuance of this strata title, the plaintiff on 4 December 2002 purportedly registered a charge in respect of the property so as to secure the loans granted. By a letter dated 28 February 2004 the plaintiff issued another demand letter to the defendant followed by the issuance to the defendant the statutory Form 16D *vide* a letter dated 19 June 2004. The present originating summons to enforce the charge was filed on 7 July 2004.

Held (dismissing originating summons with costs):

(1) The charge relied upon by the plaintiff in the present originating summons application was fatally defective: it was not signed by the chargor (the defendant) as should be the case. Instead, it was signed by one Nor Maziah Yaacob, a manager of the plaintiff's bank at the material time However, she could not be taken to have signed the charge and the annexure as the attorney of the defendant/chargor, which ought to have been the case. If she had the authority pursuant to a power of attorney to sign the charge (and annexure) as an attorney of the defendant, and had proceeded to sign as such, then these facts should be clearly stated below her signature and name, including giving particulars of the registration of the power of attorney. Instead, herein, it appeared that she had signed the charge and the annexure as the attorney of the plaintiff bank. This fact was confirmed by the attestation clause. (paras 7 & 12)

(2) According to cl. 21 of the LACA, the power of attorney is not granted by the defendant/donor to any person by name, but is granted only to 'the Manager of the [plaintiff] bank for the time being in Kuala Lumpur'. The word 'manager' nowhere appeared near the name of Nor Maziah, nor near the signature of the same, whether in the charge or in the annexure. The said Nor Maziah did not depose any affidavit to explain in what capacity (or rather as whose attorney) she executed the charge; nor was any reason given for her failure to affirm and file an affidavit. Also, there was no affidavit evidence as to the present whereabouts of the said Nor Maziah. There was no evidence to show that at the material time the said Nor Maziah was a manager attached to a Kuala Lumpur office: there was only affidavit evidence to the effect

that at the material time she was a manager in the plaintiff's bank. It followed then that there was in the first place no evidence to show that Nor Maziah was an attorney of the defendant; for she did not satisfy one of the requirements as prescribed in cl. 21 of the LACA. (para 15)

(3) The plaintiff, in the exercise of its rights under the LACA and, in particular, the power of attorney, took it upon itself the responsibility of preparing, executing and registering the charge. But having registered the charge, the plaintiff, however, did not provide the defendant with a copy of the charge (and annexure). The defendant had no opportunity at all to see the charge and annexure. He was never told to come and collect the chargor's copy of the duly registered charge from the office of the plaintiff/chargee nor did the plaintiff send him a copy. The plaintiff, in their affidavit, did not provide any answer as to why the defendant/chargor was never supplied with a copy of the charge. Notwithstanding the power of attorney conferred on the plaintiff, the defendant still at all times remained the chargor. The right of a chargor to be supplied with a copy of the charge is implied in the National Land Code. (para 16)

(4) It was unlawful for a chargee bank to retain the chargor's copy of the charge and annexure. There was nothing in the power of attorney that authorized the chargee bank to keep the chargor's copy of the charge on the chargor's behalf. Since the plaintiff had deliberately withheld the chargor's copy of the charge without any lawful excuse, such an unlawful act rendered the charge unenforceable as against the defendant. (para 16)

Case(s) referred to:
Bryant, Powis and Bryant v. La Banque du Peuple [1893] AC 170 ***(refd)***
Subramania Pillay v. Sundramal [1968] 2 MLJ ***(refd)***
Young Kee Chan & Ors v. Phileo Allied Finance (M) Bhd [2000] 4 CLJ 603 HC ***(refd)***

Legislation referred to:
National Land Code, s. 256
Rules of the High Court 1980, O. 83

For the plaintiff - SJ Huang (Sim Koh Yew with him); M/s YM Chin & Lee
For the defendant - WP Leong; M/s WP Leong & Partners

Reported by Suhainah Wahiduddin

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JUDGMENT

Hishamudin Yunus J:

[1] This originating summons is an application by the plaintiff/chargee for an order that a property of the defendant/chargor be sold by public auction pursuant to s. 256 of the National Land Code ('the NLC') and O. 83 of the Rules of the High Court 1980 ('the RHC').

[2] I have dismissed this application with costs. I shall now give my grounds.

[3] The property in question is an apartment unit at a condominium known as Tiara Damansara located in Petaling Jaya. Currently it has a strata title in the name of the defendant.

[4] Currently the property is charged to the plaintiff bank as a security in respect of two loans granted by the plaintiff bank to the defendant, way back in 1992.

[5] At the time of the granting of the loans by the plaintiff to the defendant way back in 1992, the apartment unit did not yet have a strata title. All that the defendant/borrower then had was the sale and purchase agreement between the defendant (as the purchaser) and the original purchaser of the apartment unit. So for the purpose of securing the loans, the plaintiff entered into a loan agreement cum assignment ('the LACA') with the defendant, with the assignment by the defendant of his rights in the property under the sale and purchase agreement to the plaintiff as the security for the loans. The defendant, however, defaulted on the repayment of the loans. Hence in January 1998 the plaintiff's solicitors issued a notice of demand dated 26 January 1998 to the defendant. The defendant took no action on the demand letter. What followed was the issuance by the plaintiff to the defendant of a letter dated 22 June 1998 terminating the loan facilities and demanding that the defendant pay the amounts stipulated in the letter, failing which the plaintiff would proceed to take over possession of the property and to sell the same pursuant to the LACA. Although the defendant did not satisfy the demand, however, for some unexplained reason, the plaintiff did not take any action on the security pursuant to the LACA. Subsequently, in 2002, the strata title in respect of the apartment unit was issued by the Land Office, and the unit was registered in the

name of the defendant on 4 December 2002. Following the issuance of this strata title, the plaintiff on 4 December 2002 purportedly (as to why I used the word 'purportedly' will be explained in due course) registered a charge in respect of the property so as to secure the loans granted. Subsequently, slightly more than a year later, by a letter dated 28 February 2004 the plaintiff issued another demand letter to the defendant followed by the issuance to the defendant the statutory Form 16D *vide* a letter dated 19 June 2004. The present originating summons to enforce the charge was filed on 7 July 2004.

[6] I have dismissed this application on the following grounds.

[7] First, the charge relied upon by the plaintiff in the present originating summons application is fatally defective: it was not signed by the chargor, Hew Hai Woon (ie, the defendant), as should be the case. Instead, it was signed by one Nor Maziah binti Yaacob, a manager of the plaintiff's bank at the material time.

[8] I note, however, that the said Nor Maziah purported to sign on behalf of the chargor. Her signature was attested by a solicitor named Tan Woh Heng. The said solicitor, however, contrary to the position taken by the plaintiff bank in the present case that she signed the charge as an attorney of the defendant, confirms in the attestation clause that the said Nor Maziah signed the charge as an attorney of the plaintiff bank.

[9] The plaintiff, as I have just said, contends that Nor Maziah executed the charge (and, of course, the annexure as well) as an attorney of the defendant pursuant to a power of attorney granted by the defendant under the LACA. However, this is not borne out by the charge and the annexure. In the charge, Nor Maziah's signature merely appears as follows:

> [illegible signature of Nor Maziah]
>
> HEW HAI WOON diwakili oleh
>
> STANDARD CHARTERED BANK MALAYSIA BERHAD
>
> (115793-P) oleh wakil

[10] It appears to me that the capacity in which the said Nor Maziah signed the charge, as shown above, was not clear. But anyhow the attestation clause reads (rather perplexingly):

> Saya Tang Woh Heng seorang Peguambela dan Peguamcara di Mahkamah Tinggi, Malaysia Barat, yang menjalankan amalan di Kuala Lumpur dengan ini mengaku bahawa tandatangan yang di atas itu telah ditulis di hadapan saya pada 27 haribulan November 2002 dan adalah tandatangan yang benar bagi Nor Maziah bte Yaacob (K.P. 601630-03-5006) **sebagai wakil bagi Standard Chartered Bank Malaysia Berhad** (115793-P) … (emphasis added)

[11] In the annexure, however, the signing was done in a different manner as compared to the charge, and it is as follows:

> [Signature]
>
> NOR MAZIAH BINTI YAACOB
>
> By his/her attorney STANDARD CHARTERED BANK MALAYSIA BERHAD (115793-P) by its Attorney

[12] I accept that the charge and annexure were indeed signed by the said Nor Maziah and that she purported to sign on behalf of the chargor. But, looking at the charge (and annexure) itself closely, was that objective achieved? Looking at the documents objectively, in what capacity did she sign the charge and annexure? Clearly she cannot be taken to have signed the charge and the annexure as the attorney of the defendant/chargor, which ought to have been the case. If she had the authority pursuant to a power of attorney to sign the charge (and annexure) as an attorney of the defendant, and had proceeded to sign as such, then these facts should be clearly stated below her signature and name, including giving particulars of the registration of the power of attorney. Instead, in the present case, it appears that probably a blunder had been committed here: for she had signed the charge and the annexure as the attorney of the plaintiff bank! And this fact is confirmed by the attestation clause. In *Young Kee Chan & Ors v. Phileo Allied Finance (M) Bhd* [2000] 4 CLJ 603 I said (at p. 612):

> To put the matter briefly, where a person signs an agreement as an attorney, the fact of signing as an attorney must be stated clearly at the execution clause. It is not a matter to be taken lightly or that could be just glossed over.

[13] If the said Nor Maziah was a manager in the Kuala Lumpur office of the plaintiff at the time of signing, and indeed had signed the charge as an attorney of the defendant/chargor, she ought to have signed the charge and annexure in the following manner:

> [signature]
>
> Nor Maziah, Pengurus di Kuala Lumpur,
>
> Standard Chartered Bank Malaysia Berhad
>
> Sebagai wakil Hew Hai Woon di bawah surat wakil kuasa
>
> Yang di daftarkan di Mahkamah Tinggi [to specify the High Court concerned, e.g. 'Mahkamah Tinggi, Kuala Lumpur']
>
> Nombor pendaftaran surat wakil kuasa: [to state here the registration number of the power of attorney]

[14] And the attestation clause ought to have been in the following manner instead:

> Saya Tang Woh Heng seorang Peguambela dan Peguamcara di Mahkamah Tinggi, Malaysia Barat, yang menjalankan amalan di Kuala Lumpur dengan ini mengaku bahawa tandatangan yang di atas itu telah ditulis di hadapan saya pada 27 haribulan November 2002 dan adalah tandatangan yang benar bagi Nor Maziah bte Yaacob (K.P. 601630-03-5006), **Pengurus di Standard Chartered Bank Berhad, di Kuala Lumpur, sebagai wakil bagi HEW HAI WOON (NO: K.P. 3561064) di bawah surat wakil kuasa** [to state the particulars of the registration of the power of attorney] (emphasis added)

[15] Further, there is the principle that powers of attorney are to be construed strictly (see *Bryant, Powis and Bryant v. La Banque du Peuple* [1893] AC 170 and *Subramania Pillay v. Sundramal* [1968] 2 MLJ and *Young Kee Chan*). Bearing this principle in mind, it is pertinent to observe that according to cl. 21 of the LACA (the clause that grants the power of attorney), the power of attorney is not granted by the defendant/donor to any person by name, but is granted only to 'the Manager of the (plaintiff) bank for the time being in Kuala Lumpur'. In other words, the power of attorney is granted to a person by virtue of his office: it is granted to any officer of the plaintiff's bank who holds the position of a manager at the material time. Then again, the power of attorney is not granted to just any manager of the plaintiff's bank:

A it is only granted to a manager 'for the time being in Kuala Lumpur'. This means that the manager, who signs the charge, at the time when he signs the charge, must be attached to a Kuala Lumpur office of the plaintiff. Now bearing this requirement in mind, if we were to examine closely the charge instrument, it will
B be observed that the said Nor Maziah, who signed the charge and annexure, never signed the charge as a manager of the plaintiff, let alone as a manager of a Kuala Lumpur office of the plaintiff. Indeed, the word 'manager' nowhere appears near the name of Nor Maziah, nor near the signature of the same, whether in the
C charge or in the annexure. Now, the said Nor Maziah did not depose any affidavit to explain in what capacity (or, rather as whose attorney) she executed the charge; nor was any reason given for her failure to affirm and file an affidavit. Also, there is no affidavit evidence as to the present whereabouts of the said Nor
D Maziah (that is to say, particularly, whether she is still an officer of the plaintiff bank). The supporting affidavit of the plaintiff is deposed by a Credit Control Officer of the plaintiff bank, by the name of Lee Pei Ling. At para. 4 of his affidavit he avers that Nor Maziah signed the charge and the annexure in a dual capacity: as
E a manager of the plaintiff bank as well as an attorney of the defendant. But his affidavit never mentions as to which office of the plaintiff Nor Maziah was attached to at the material time (that is to say whether she was attached to the Kuala Lumpur office or whether she was attached elsewhere). There is, therefore, no
F evidence to show that at the material time the said Nor Maziah was a manager attached to a Kuala Lumpur office: there is only affidavit evidence to the effect that at the material time she was a manager in the plaintiff's bank. It follows then that there is in the first place no evidence to show that Nor Maziah was an attorney
G of the defendant; for she did not satisfy one of the requirements as prescribed by cl. 21 of the LACA. But to reiterate what has been said earlier, even assuming the said Nor Maziah had the power to execute the charge as an attorney of the defendant/ chargor, the documentary evidence (that is to say the charge and
H the annexure) shows that she did not sign the charge as such: instead, probably due to some blunder, she had signed the charge as an attorney of the plaintiff bank/chargee.

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[16] I now move on to my second ground for dismissing the application. It is this. In the present case, the plaintiff, in the exercise of its rights under the LACA and, in particular, the power of attorney, took it upon itself the responsibility of preparing, executing and registering the charge. But having registered the charge, the plaintiff, however, did not provide the defendant with a copy of the charge (and annexure). The defendant had no opportunity at all to see the charge and annexure. He was never told to come and collect the chargor's copy of the duly registered charge from the office of the plaintiff/chargee; nor did the plaintiff send him a copy. The chargor's copy was throughout kept by the plaintiff bank. The plaintiff, in their affidavit, did not provide any answer as to why the defendant/chargor was never supplied with a copy of the charge. It is true that the power of attorney gives the plaintiff/chargee the authority to execute the charge. But the power of attorney does not affect the defendant's right to be supplied with a copy of the charge. Notwithstanding the power of attorney conferred on the plaintiff, the defendant still at all times remains the chargor. Yet the first time that the defendant saw the charge was only on 17 September 2004, when the defendant received the charge together with the annexure by post from the plaintiff. But by then it was already too late. For, earlier on, on 7 July 2004, the present originating summons had already been filed. What is the point of supplying the chargor with a copy of the charge only after the plaintiff/chargee had already commenced foreclosure proceeding against the chargor? In my judgment, as a matter of law, a copy of the charge must be given to the chargor – in this case the defendant – by the chargee bank, after the chargee bank had duly registered the charge with the Land Office. After all, a charge is an agreement between the chargor/defendant and the chargee bank. It is the chargor's right to be supplied with a copy of the charge and annexure. It is all the more so where the charge was not executed by the chargor but (purportedly) by a manager of the plaintiff bank (the chargee) pursuant to a power of attorney. And it was the chargee's duty to supply the defendant with the chargor's copy. The plaintiff/chargee cannot deny the chargor this right. The right of a chargor to be supplied with a copy of the charge is implied in the National Land Code. In my opinion it is unlawful for a chargee bank to retain the chargor's copy of the charge and annexure (unless the chargor could not be traced or that the chargor is avoiding the service of

A the charge – which is not the situation in the present case). There is nothing in the power of attorney that authorizes the chargee bank to keep the chargor's copy of the charge on the chargor's behalf. Since the plaintiff has deliberately withheld the chargor's copy of the charge without any lawful excuse, such an unlawful
B act, in my opinion, renders the charge unenforceable as against the defendant.

[Originating summons dismissed with costs.]

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